Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

JAMES L. WILLIAMS, SPECIALIST,
UNITED STATES ARMY, *PETITIONER*

v.

THE UNITED STATES OF AMERICA, *RESPONDENT.*

Petition For A Writ Of Certiorari To The United States Court of Appeals for the Armed Forces

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

This is the first case affirmed by the military courts to come before this Court since Military Rule of Evidence 707's *per se* ban on the admissibility of polygraph evidence. Because of a split in the Courts of Appeals on the admissibility of polygraph evidence and due to this case's unique resolution by the court below, this case raises an important constitutional question regarding the manner in which Military Rule of Evidence 707 currently operates. The question presented is:

> **Whether Military Rule of Evidence 707's *per se* prohibition against the receipt of polygraph evidence at trial violates petitioner's constitutional rights to a fair trial or his sixth amendment right to produce favorable witnesses?**

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SUPREME COURT OF THE UNITED STATES

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JAMES L. WILLIAMS,
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v.

THE UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

PETITION FOR A WRIT OF CERTIORARI

The petitioner, James L. Williams, respectfully prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Armed Forces entered in this proceeding.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Armed Forces [hereinafter Court of Appeals] is reported at ___ M.J. ___ (1995) (Appendix A). The

opinion of the United States Army Court of Military Review [now the United States Army Court of Criminal Appeals] [hereinafter Army court] is reported at 39 M.J. 555 (A.C.M.R. 1994) (Appendix B).

JURISDICTION

The judgment of the Court of Appeals for the Armed Forces was entered on September 29, 1995. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1259(2) (Supp. 1992).

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED

The Constitution of the United States provides in pertinent part:

> Article I, Section 1, "All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives."
>
> Article I, Section 8. "The Congress shall have Power ... To make Rules for the Government and Regulation of the land and naval Forces ... To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers...."
>
> Article II, Section 1. "The executive Power shall be vested in a President...."
>
> Article II, Section 2. "The President shall be Commander in Chief of the Army...."
>
> Amendment V. "No person shall be ... deprived of life, liberty, or property, without due process of law."

Amendment VI. "In all criminal prosecutions, the accused shall enjoy the right ... to have compulsory process for obtaining witnesses in his favor; and to have the Asistance of Counsel for his defence."

The following provisions of the Uniform Code of Military Justice involved in this case provide in pertinent part:

Article 18, 10 U.S.C. § 818.

> [G]eneral courts-martial have jurisdiction to try persons subject to this chapter for any offense made punishable by this chapter and may, under such limitations as the President may prescribe, adjudge any punishment not forbidden by this chapter....

Article 36, 10 U.S.C. § 836.

> (a) Pretrial, trial, and post-trial procedures, including modes of proof, for cases arising under this chapter triable in courts-martial ... may be prescribed by the President by regulations which shall, so far as he considers practical, apply the principles of law and rules of evidence generally recognized in the trial of criminal cases in the United States district courts, but which may not be contrary to or inconsistent with this chapter.
>
> (b) All rules and regulations made under this article shall be uniform insofar as practicable.

Article 121, 10 U.S.C. § 921.

> (a) Any person subject to this chapter who wrongfully takes, obtains, or withholds, by any means, from the possession of the owner or of any other person any money, personal property, or article of value of any kind—
>
> (1) with intent permanently to deprive or defraud another person of the use and benefit of the

property or to appropriate it to his own use or the use of any person other than the owner, steals that property and is guilty of larceny; or

(2) with intent temporarily to deprive or defraud another person of the use and benefit of property or to appropriate it to his own use or the use of any person other than the owner, is guilty of wrongful appropriation.

(b) Any person found guilty of larceny or wrongful appropriation shall be punished as a court-martial may direct.

Article 123, 10 U.S.C. § 923.

Any person subject to this chapter who, with intent to defraud—''

''(1) falsely makes or alters any signature to, or any part of, any writing which would, if genuine, apparently impose a legal liability on another or change his legal right or liability to his prejudice; or''

''(2) utters, offers, issues, or transfers such a writing, known by him to be so made or altered; is guilty of forgery and shall be punsihed as a court-martial may direct.''

The following provisions of the Manual for Courts-Martial, United States, 1984, are involved in this case:

Military Rule of Evidence 401. Definition of ''relevant evidence.''

''Relevant evidence'' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

Military Rule of Evidence 402. Relevant evidence generally admissible; irrelevant evidence inadmissible.

All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States as applied to members of the armed forces, the code, these rules, this Manual, or any Act of Congress applicable to members of the armed forces. Evidence which is not relevant is not admissible.

Military Rule of Evidence 403. Exclusion of relevant evidence on grounds of prejudice, confusion, or waste of time.

Although relevant, evidence may be excluded if its probative value is substantially outweighted by the danger of unfair prejudice, confusion of the issues, or misleading the members, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Military Rule of Evidence 702. Testimony by Experts.

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

Military Rule of Evidence 707. Polygraph Examinations.

(a) Notwithstanding any other provision of law, the results of a polygraph examination, the opinion of a polygraph examiner, or any reference to an offer to take, failure to take, or taking of a polygraph examination, shall not be admitted into evidence.

(b) Nothing in this section is intended to exclude from evidence statements made during a polygraph examination which are otherwise admissible.

Paragraph 46, Part IV-Punitive Articles.

(e)(1)(d) Maximum punishment, Larceny.

Dishonorable discharge, forfeiture of all pay and allowances, and confinement for five years.

(e)(2)(b) Maximum punishment, Wrongful appropriation.

Bad-conduct discharge, forfeiture of all pay and allowances, and confinement for 6 months.

STATEMENT OF THE CASE

On October 27, November 2, and December 3 and 11, 1992, Specialist Williams was tried at Hanau and Frankfurt, Germany before a general court-martial composed of officer and enlisted members. Contrary to his pleas, Specialist Williams was found guilty of one specification of larceny of $8077.89[1] and twelve specifications of forgery, in violation of Uniform Code of Military Justice articles 121 and 123, 10 U.S.C. §§ 921 and 923 (1988). Specialist Williams was sentenced to a bad-conduct discharge, three years confinement, forfeiture of all pay and allowances, and reduction to the grade of Private E1. The convening authority approved the sentence as adjudged.

On January 28, 1994, the Army Court of Military Review [now the Army Court of Criminal Appeals] [hereinafter Army court] ordered an evidentiary hearing on the admissibility of the polygraph evidence proffered by Specialist Williams. *United States v. Williams*, 39 M.J. 555, 559 (A.C.M.R. 1994) (Appendix B.)

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[1]Specialist Williams pleaded guilty by exceptions and substitutions to the lesser-included offense of wrongful appropriation of approximately $2500.00 but was convicted of the greater offense.

Following the decision by the Army court, The Judge Advocate General of the Army certified[2] the following issue to the United States Court of Appeals for the Armed Forces[3] [hereinafter Court of Appeals]:

> "WHETHER MILITARY RULE OF EVIDENCE 707 VIOLATES THE ACCUSED'S FIFTH AMENDMENT RIGHT TO A FAIR TRIAL OR HIS SIXTH AMENDMENT RIGHT TO PRODUCE FAVORABLE WITNESSES."

United States v. Williams, 39 M.J. 408 (1994) (journal).

The Court of Appeals rendered its opinion on September 29, 1995, set aside the decision of the Army court, and remanded the case to the Army court for further review. *United States v. Williams*, ___ M.J. ___ (1995) (Appendix A).

STATEMENT OF FACTS

A summary of the facts found by the Army court and adopted by the Court of Appeals is as follows:

> [Accused] was a Chaplains' Fund Clerk who, along with the Fund Manager, was in charge of collecting and disbursing funds for the chaplaincy within V

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[2] Article 67(a)(2) U.C.M.J. authorizes the Judge Advocate General [of the Army] to "certify" or direct that specific legal issues, already reviewed by the Army court, be reviewed by the Court of Appeals for the Armed Forces. This is a non-discretionary review by the Court of Appeals for the Armed Forces.

[3] This issue was previously the subject of a Petition for Extraordinary Relief in the Nature of a Writ of Mandamus and a Motion for Stay of Proceedings Pendente Lite filed with the Army Court of Criminal Appeals, and a Writ Appeal petition filed with the U.S. Court of Appeals for the Armed Forces, all of which were denied without prejudice to appellant's right to assert the same claims of error during the course of regular appellate review.

Corps. During the period 18 August 1991—18 February 1992, a total of eighteen unauthorized disbursements were made from the fund account. [Accused] admitted to misappropriating three of these unauthorized disbursements in 1992, which he said that he intended to repay. He denied stealing the remainder.

In July 1992, [accused] consented to taking a Criminal Investigation Command (CID) administered polygraph test. The test centered on whether [accused] stole from the chaplains' fund between August and November of 1991. In the polygraph examiner's opinion, there was no deception indicated when [accused] responded "no" to questions pertaining to the tested issue. The charts created by the polygraph instrumentation were then sent to the CID's quality control center in Maryland, which opined that the test results were inconclusive.

In August 1992, upon request by [accused], he was retested by the same CID polygrapher. A more detailed pretest interview was conducted in order to focus [accused] so that he would not be distracted, which could cause the test to be inconclusive. After this test, the examiner again opined that [accused] was indicating no deception when he said that he did not steal money form the chaplains' fund between August and November 1991. Unlike the previous test, the examiner sent these polygraph charts to Heidelberg for review by his immediate supervisor, who was also an experienced CID polygrapher. The supervisor agreed with the findings and forwarded the charts to quality control in Maryland. This time, quality control opined that the test indicated no deception, and went on to say that the findings of the two examiners were "strong."

[Accused] filed a motion at his court-martial to be allowed an opportunity to lay a foundation for the

admission of the two exculpatory CID polygraph examinations. The military judge denied the motion, finding Mil. R. Evid. 707 to be a proper exercise of executive rule-making authority under Article 36, UCMJ, and violative of neither the Fifth nor Sixth Amendments of the Constitution. This ruling "impacted greatly" on [accused's] decision not to testify.

United States v. Williams, 39 M.J. at 556-57.

REASONS FOR GRANTING THE WRIT

a. There is a conflict in the circuits over the admissibility of polygraph evidence.

There is a split in the Circuit Courts of Appeals on the issue of whether polygraph evidence offered in his own defense by a defendant is admissible in a criminal trial. The petitioner pled guilty to the lesser-included offense of wrongful appropriation of the proceeds from three checks totaling $2,528.00, but not guilty to the greater offense of larceny with regard to the proceeds of those three checks and to the remaining $5,549.89 of the charged larceny. Petitioner also pled not guilty to the 12 charged forgeries. The facts underlying petitioner's conduct with regard to the three checks to which he pled guilty were largely undisputed; his principal defense was that he lacked the intent to permanently deprive the owner of the proceeds from the three checks and did not steal the proceeds from the remaining checks.

The trial judge found that the polygraph evidence proffered could not be received into evidence, citing Manual for Courts-Martial, United States, 1984, Military Rule of Evidence [hereinafter Mil. R. Evid.]

707's blanket prohibition against polygraph evidence. Thus, the trial judge never employed a *Daubert* analysis. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, ___ U.S. ___, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993). The rule regarding polygraphs differs in the other Circuits because there is no evidentiary rule that is a *per se* prohibition against the receipt of polygraph evidence. Absent this prohibition, a *Daubert* analysis must be undertaken to determine if proffered polygraph evidence is admissible and, if so, for what purpose.

Even before *Daubert*, however, there was a split in the Circuits as to whether, and for what purposes, polygraph evidence can be admissible at trial.

The Fourth, Fifth[4], and District of Columbia Circuits historically have held polygraph evidence *per se* inadmissible. *United States v. Brevard*, 739 F.2d 180 (4th Cir. 1984); *United States v. Clark*, 598 F.2d 994, 995 (5th Cir. 1979), *vacated en banc*, 622 F.2d 917 (1980), *cert. denied*, 449 U.S. 1128, 101 S.Ct. 949, 67 L.Ed.2d 116 (1981); *United States v. Skeens*, 494 F.2d 1050, 1053 (D.C.Cir. 1974).

However, the Third, Sixth, Seventh, Ninth, and Tenth Circuits have in the past relied on the trial judge's sound discretion on whether to admit polygraph evidence, while the Eight and Eleventh Circuits allow polygraph evidence in limited circumstances.

The Third and Seventh Circuits permit polygraph evidence to be introduced for the purpose of rebutting a claim by the defendant that his confession was the result of coercion. *United States v. Johnson*, 816 F.2d 918, 923 (3rd Cir. 1987); *United States v. Kampiles*, 609 F.2d 1233, 1245 (7th Cir. 1979), *cert. denied*, 446 U.S. 954, 100 S.Ct. 2923, 64 L.Ed.2d 812 (1980).

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[4]The rule in the Fifth Circuit has changed since *Daubert* and will be addressed later in the brief.

The Sixth Circuit has used an approach to admission similar to that espoused by this Court in *Daubert.*[5] *Wolfel v. Holbrook*, 823 F.2d 970 (6th Cir. 1987), *cert. denied*, ___ U.S. ___, 108 S.Ct. 1035, 98 L.Ed.2d 999 (1988).

The Eighth and Eleventh circuits rested their approach upon the right of the parties to stipulate to the admission of polygraph evidence. *United States v. Piccinonna*, 885 F.2d 1529 (11th Cir. 1989) (Polygraph expert testimony is admissible when both parties stipulate in advance to circumstances of test and as to scope of its admissibility; stipulation must indicate the parties agreement on material matters such as manner in which test is conducted, nature of questions asked, and identity of examiner administering test, while stipulation as to scope of admissibility must indicate purpose or purposes for which evidence will be introduced); *Anderson v. United States*, 788 F.2d 517, 519 (8th Cir. 1986); *United States v. Alexander*, 526 F.2d 161, 166 (8th Cir. 1975). However, in another line of Eighth Circuit cases polygraph evidence is also admissible in limited circumstances; the trial judge may admit such evidence offered by the defense if the Government does not object. *United States v. Yeo*, 739 F.2d 385, 388 (8th Cir. 1984); *United States v. Oliver*, 525 F.2d 731, 736 (8th Cir. 1975) (a discretionary rather than a *per se* exclusionary rule is appropriate).

The Ninth Circuit holds polygraph evidence admissible only when the limited purpose for which it is offered is unrelated to the substantive correctness of

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[5] "First, the trial court must determine if the proffered evidence is relevant. Second, if the court concludes that the proffered evidence is relevant, it must balance the probative value of the evidence against the hazard of unfair prejudice and/or confusion which could mislead the jury." *Wolfel v. Holbrook*, 823 F.2d at 972.

the results of the polygraph examination. *United States v. Miller*, 874 F.2d 1255, 1262 (9th Cir. 1989); *United States v. Bowen*, 857 F.2d 1337, 1341 (9th Cir. 1988).

The Tenth Circuit has allowed the government to rebut a defense assertion of a slipshod police investigation by introducing the fact that the defendant has failed a polygraph test to explain why police investigators did not continue their investigation. *United States v. Hall*, 805 F.2d 1410 (10th Cir. 1986).

Since *Daubert* was decided by this Court, only the Fifth Circuit has addressed the admissibility of polygraph evidence. In *United States v. Posado*, 57 F.3d 328, 433 (5th Cir. 1995), the defendants were convicted of conspiracy to possess and possession with intent to distribute cocaine. At trial the defendants offered polygraph evidence to support their position that consent to search their baggage at an airport was not voluntary. The Fifth Circuit held that polygraph evidence would no longer be *per se* inadmissible for any purpose, and that a remand was required to determine whether, under the facts of that case, polygraph evidence would be admissible. In essence, the Fifth Circuit held that after *Daubert*, a *per se* rule is not viable. *Id.*

This Court should grant certiorari where, as in this case, a defendant's rights are distinctly different depending upon the Circuit in which the trial is held.

b. When the President promulgates a rule of evidence, such as Military Rule of Evidence 707's *per se* bar to the receipt of polygraph evidence, that results in a deprivation of the petitioner's Fifth and Sixth Amendment rights, the President has exceeded his authority to promulgate such a rule.

At a time when the admissibility of polygraph evidence is more liberally considered pursuant to this

> Court's decision in *Daubert*, Mil. R. Evid. 707's bar to the admission of polygraph evidence does not conform to the current practice of other Federal courts. Because the Military Rules of Evidence are promulgated by the President of the United States in accordance with a delegation of legislative authority by Congress contained in article 36, Uniform Code of Military Justice, 10 U.S.C. § 836 (1988), it is necessary to examine the parameters of the authority granted to the President. Article 36 states in pertinent part that the President may prescribe procedures that:
>
> ... so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts.

It is clear from the federal polygraph cases discussed above that Mil. R. Evid. 707's *per se* prohibition against the receipt of polygraph evidence does not apply principles recognized in the Circuit courts or by this Court's decision in *Daubert*. Rather, Mil. R. Evid. 707 is contrary to the Circuits' mandate to analyze the admissibility of polygraph evidence under the Federal Rules of Evidence in accordance with this Court's decision in *Daubert*. Certainly, the promulgation and application of a rule of evidence which, as in the case *sub judice*, acts to automatically deprive petitioner of his right to attempt to lay the foundation for the receipt of relevant and favorable evidence is a rule that deprives petitioner of his Fifth and Sixth Amendment rights. Such a rule cannot be considered an application of the "rules of evidence generally recognized in ... the United States district courts." Military Rule of Evidence 707 is not a proper use of the legislative authority delegated by article 36, U.C.M.J.

c. The Court of Appeals erroneously disposed of the certified issue by holding that the proffered exculpatory

polygraph evidence was not relevant because the petitioner never testified at trial, despite the fact that petitioner's sworn statement, which he was seeking to support, was admitted in evidence against him by the government in its case in chief.

On appeal, the Army court recognized that Mil. R. Evid. 707(a) established a categorical bar to the admissibility of polygraph evidence and that the Rule "effectively removes any discretion from a military judge to weigh the legal and logical relevance of polygraph evidence." The Army court further noted that the Rule was "a dramatic shift from prior military precedent" which analyzed expert testimony under Mil. R. Evid. 401, 402, 403, and 702 in a manner similar to the approach that this Court announced in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, ___ U.S. ___, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993). *Williams*, 39 M.J. at 557. The Army court held that in the case at bar, where appellant was prevented by operation of Mil. R. Evid. 707 from even attempting to demonstrate that exculpatory polygraph evidence was reliable, relevant, or helpful, petitioner's Fifth Amendment right to a fair trial by court-martial had been violated. Further, the Army court held that petitioner's Sixth Amendment right to produce favorable witnesses on his behalf, "affords him the opportunity to be heard on these foundational matters, and allows for the possibility of admitting polygraph evidence, notwithstanding the explicit prohibition of Mil. R. Evid. 707." Therefore, the Army court remanded the case for a hearing on the admissibility of the proffered polygraph evidence consistent with their opinion. *Id.*, 39 M.J. at 558-559. Following certification by The Judge Advocate General of the Army, pursuant to Article 67(a)(2), 10 U.S.C. § 867(a)(2) (1989), the Court of Appeals reversed the decision of the Army court.

In doing so, the Court of Appeals first analyzed Mil. R. Evid. 402 (analogous to Fed. R. Evid. 402) in a manner

consistent with this Court's approach in *Daubert*. The Court of Appeals ultimately determined that a *Daubert* analysis is inapposite because an evidentiary rule specifically governs the admissibility of polygraph evidence. *Williams*, ___ M.J. ___ (1995) slip op. at 6 (Appendix A).

Next, the Court of Appeals turned to the issue of whether the receipt of the exculpatory polygraph evidence was constitutionally required. The Court of Appeals concluded that it was not. Furthermore, the Court of Appeals announced that the instant case was not the appropriate case in which to decide whether Mil. R. Evid. 707 is constitutionally sound because appellant never took the stand at trial, therefore, his profferred polygraph evidence was inadmissible as it was not made relevant. *Williams*, ___ M.J. ___ (1995), slip op. at 10-11 (Appendix A). The Court of Appeals set aside the Army court's decision to remand this case to the trial court for an evidentiary hearing and remanded it to the Army court for further review.

Not only did the Court of Appeals fail to answer the issue certified by The Judge Advocate General of the Army, but by erroneously finding that petitioner's Fifth and Sixth Amendment rights were not violated in light of petitioner's failure to testify at trial, the Court of Appeals clearly failed to apply Mil. R. Evid. 401 properly.[6] The Court of Appeals failed to recognize that the exculpatory polygraph evidence was directly relevant to a sworn statement made by petitioner, admitted in evidence by the government in its case in chief, wherein petitioner admitted limited criminal liability but denied responsibility for the bulk of the charged offenses. Thus, it was not necessary for petitioner to take the stand to make the polygraph

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[6]This Court has announced with regard to Fed. R. Evid. 401: "The Rule's basic standard of relevance ... is a liberal one." *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, ___ U.S. ___, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993).

evidence relevant under these circumstances; his sworn statement, admitted in the government's case, made it so. By moving to admit his polygraph evidence, petitioner sought to do no more than lend weight to his statement which the government had used against him. Although petitioner's statement admitted to limited criminal liability, petitioner wanted the finder of fact to know that it could rightfully consider the four corners of the statement, but that it would be unfair to draw any inference of further criminal conduct from it.

Petitioner should be allowed to lend credibility to an admission that the government has used in its case in chief by showing that he was administered a polygraph that supports his admission; i.e., that his criminal liability was limited to what was in his admission and nothing more. Had the Army court's decision not been set aside, there would have been a record from which the reviewing courts could determine whether petitioner had met the requirements for admissibility under *Daubert* and had shown the relevance of the polygraph to the statement that was entered against him.

In a case such as this, the United States Constitution requires that petitioner's rights under the Fifth and Sixth Amendments prevail over the blanket prohibition against the receipt of polygraph evidence espoused in Mil. R. Evid. 707 and adopted by the trial judge. By erroneously disposing of the issue, purportedly for lack of relevance, the Court of Appeals sidestepped its clear mandate to review the certified issue on its merits as established by the United States Congress in the Uniform Code of Military Justice, article 67. Moreover, the Court of Appeals erred when they opted to abandon the search for truth by preventing petitioner from establishing a record for his claim, based on a clear misapplication of the rule of relevance.

In the words of the Court of Appeals:

> In concluding that accused had no right to introduce the polygraph evidence without taking the stand and testifying consistently, or without offering some other plausible evidentiary basis, we recognize that we resolve little of the underlying question of the constitutionality of Mil. R. Evid. 707. Indeed, we do not even resolve whether the *per se* exclusion of this genre of evidence can be sufficient to implicate a constitutional right of an accused. That is to say, is this collateral-type evidence (an out-of-court, post-offense assertion of innocence by an accused, offered by the accused) of the same constitutional magnitude as those types of evidence that the Supreme Court has ruled constitutionally required? There are simply so many variables in the circumstances of individuals cases, that we deem it fruitless at this point to speculate generally in the absence of specific facts.

United States v. Williams, ___ M.J. ___ (1995) slip op. at 13 (Appendix A).

The necessity to rectify the Court of Appeals' failure to protect the constitutional rights of petitioner because of its misapplication of law, warrants the exercise of this Court's appellate jurisdiction.

d. The petitioner was substantially prejudiced because he was not allowed to present a defense and compel favorable witnesses.

The Fifth Amendment to the United States Constitution provides, in part: "No person shall be ... deprived of life, liberty, or property, without due process of law." The Sixth Amendment provides, in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right ... to have compulsory process for obtaining witnesses in his favor...." "The right to offer the testimony of witnesses,

and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts." *Washington v. Texas*, 388 U.S. 14, 19 (1967) (Sixth Amendment violated by arbitrary denial of accomplice testimony in favor of the defense).

The combined effect of these provisions is a "require[ment] that criminal defendants be afforded a meaningful opportunity to present a complete defense." *California v. Trombetta*, 467 U.S. 479, 485 (1984). In other words, an accused must be afforded a fundamentally fair trial in which he is afforded "an opportunity to be heard in his defense—a right to his day in court." *In Re Oliver*, 333 U.S. 257, 273 (1948).

This Court has often declared that "[f]ew rights are more fundamental than that of an accused to present witnesses in his own defense." *Taylor v. Illinois*, 484 U.S. 400, 408 (1988); *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973). Moreover, to protect this fundamental right, this Court has consistently reversed convictions where the accused was denied the opportunity to present relevant, probative evidence in his defense because of mechanistic application of *per se* exclusionary rules.

In the case *sub judice*, Specialist Williams was denied the opportunity to be heard on the relevance and probative value of favorable testimony expected from a government polygraph examiner. The military judge based his ruling exclusively on Mil. R. Evid. 707, which provides:

> Notwithstanding any other provision of law, the results of a polygraph examination, the opinion of a polygraph examiner, or any reference to an offer to take, failure to take, or taking of a polygraph examination, shall not be admitted into evidence.

As the Army court recognized, the total ban on polygraph evidence respresents a dramatic shift from prior

precedent. Although such evidence was explicitly prohibited under the 1969 version of the Manual for Courts-Martial, it was not *per se* excludable under the 1984 Manual provisions. Rather than establish a bright-line rule, the 1984 Manual left the question open for analysis under the Military Rules of Evidence. *See* Paragraph 142e, M.C.M., (1969 Rev.); *United States v. Howard*, 24 M.J. 897 (C.G.C.M.R. 1987).

In *United States v. Gipson*, 24 M.J. 246 (C.M.A. 1987), the Court of Appeals first addressed the admissibility of polygraph evidence under Mil. R. Evid. 401-403 and 702, the military counterparts to Fed. R. Evid. 401-403 and 702. At trial, the accused had moved for admission of an exculpatory polygraph examination which was secured at his own initiative and expense. Likewise, the government moved for admission of the testimony of a Naval Investigative Service polygrapher who examined the accused and concluded he was being deceptive in answering relevant questions. The trial court ruled that neither party would be permitted to lay a foundation or to admit the polygraph evidence.

In reviewing the trial court's ruling, the Court of Appeals, in an opinion written by Judge Cox, abandoned the *per se* exclusion of polygraph evidence in favor of a review under the relevant rules of evidence:

> In our assessment, the state of the polygraph technique is such that, depending on the competence of the examiner, the suitability of the examinee, the nature of the particular testing process employed, and such other factors as may arise, the results of a particular examination may be as good as or better than a good deal of expert and lay evidence that is routinely and uncritically received in criminal trials....
>
> [W]e do not suggest that all polygraph evidence is admissible or that this particular evidence should have

> been admitted. Appellant still bears the burden of establishing the foundational predicates outlined above. Our holding here is only that appellant is entitled to attempt to lay that foundation.

Gipson, 24 M.J. at 253.

Under this pre- Mil. R. Evid. 707 framework, military judges had routinely allowed the parties to attempt to lay the foundation for admissibility of polygraph evidence. Likewise, military courts had almost habitually ruled this evidence to be inadmissible based on the failure of the proponent to establish the requisite foundation. *See, e.g., United States v. Rodriguez*, 37 M.J. 448 (C.M.A. 1993); *United States v. McKinnie*, 32 M.J. 141 (C.M.A. 1991). *United States v. West*, 27 M.J. 223, (C.M.A. 1988); *United States v. Baldwin*, 25 M.J. 54 (C.M.A. 1987); Thus, it is clear that regardless of this Court's ruling, the military courts are not going to be overwhelmed with defense poloygraph evidence.

In the case *sub judice*, the Army court did not hold that Mil. R. Evid. 707 is *per se* unconstitutional. Likewise, the Army court did not rule that Specialist Williams' polygraph evidence must be admitted. To the contrary, the Army court reached a narrow conclusion that "as applied to the facts of this case" Mil. R. Evid. 707 is an unconstitutional restriction on Specialist Williams' right to lay a foundation for the admissibility of favorable poloygraph evidence. *Williams*, 39 M.J. at 556. To resolve this issue, the Army court ordered a limited hearing on the admissibility of the proffered polygraph evidence. The court specified that if the military judge finds the evidence to be admissible, he should set aside the findings and sentence. The convening authority could then order a rehearing. On the other hand, if the military judge rules against admission of the polygraph evidence, then the case must be returned to the Army court for further review. *Id.* at 559.

The ultimate issue in this case is whether the government can rely on a *per se* rule of evidence that denies an accused the opportunity to show that he has exculpatory evidence and to present that favorable evidence if an evidentiary foundation is established. This Court has reversed in similar cases. For instance, in *Rock v. Arkansas*, 483 U.S. 44 (1987), this Court reversed a state court opinion that relied on a *per se* exclusionary rule without regard to the rights of the accused. In *Rock*, the petitioner was charged with manslaughter based on the shooting death of her husband. Because petitioner could not remember the precise details of the shooting, her attorney suggested that she submit to hypnosis in order to refresh her memory. She was, in fact, hypnotized twice but did not relate any new information during either of the sessions. After the hypnosis, however, she remembered details of the shooting that were corroborated by other evidence in this case.

At the time of petitioner's trial, Arkansas had a rule of evidence that *per se* prohibited the admission of such evidence at trial. Thus, acting on the government's pretrial motion, the trial court issued an order limiting petitioner's testimony to matters remembered and stated to the examiner prior to hypnosis.

In reviewing the scientific validity of hypnosis, this Court noted that "there is no generally accepted theory to explain the phenomenon, or even a consensus on a single definition of hypnosis. The use of hypnosis in criminal investigations, however, is controversial, and the current medical and legal view of its appropriate role is unsettled." *Rock*, 483 U.S. at 59 (citation and footnote omitted). Moreover, this Court declared that "[w]e are not now prepared to endorse without qualifications the use of hypnosis as an investigative tool; scientific understanding of the phenomenon and of the means to control the effects of hypnosis is still in its infancy." *Rock*, 483 U.S. at 61. Nonetheless, this Court declared:

> Arkansas, however, has not justified the exclusion of *all* of a defendant's testimony that the defendant is unable to prove to be the product of prehypnosis memory. A State's legitimate interest in barring unreliable evidence does not extend to *per se* exclusions that may be reliable in an individual case. Wholesale inadmissibility of a defendant's testimony is an arbitrary restriction on the right to testify in the absence of clear evidence by the State repudiating the validity of all posthypnosis recollections.

Rock, 483 U.S. at 61. *See also Davis v. Alaska*, 415 U.S. 308 (1974) (petitioner's right of confrontation is paramount to the State's rule prohibiting cross-examination of government witness concerning his probationary status as a juvenile delinquent).

Similarly, in *Chambers v. Mississippi, supra*, this Court held that evidentiary rules "may not be applied mechanistically to defeat the ends of justice." 410 U.S. at 302. In *Chambers*, the accused was convicted of murdering a policeman. After his arrest, but prior to trial, another man, McDonald, confessed to the murder in a sworn written statement and in three other separate oral statements. McDonald was called as a defense witness, but repudiated his sworn statement. Chambers was unable to present a defense by cross-examining McDonald due to a state rule preventing a party from impeaching his own witness. Likewise, McDonald's oral confessions to others were excluded from evidence as inadmissible hearsay. This Court held that even though the accused was able to "chip ... away at the fringes" of McDonald's story by the admission of other evidence, his defense was "far less persuasive than it might have been had he been given an opportunity" to present a complete defense. *Id.* at 294. Thus, without deciding the validity of the state "voucher" rule and while plainly recognizing the validity and

widespread acceptance of the hearsay rule, this Court held that the combination of these two evidentiary rules as applied in *Chambers* denied the accused his right to a fundamentally fair trial. *Id.* at 303. *See also Crane v. Kentucky*, 476 U.S. 683 (1986) (exclusion of testimony about the circumstances of his confession deprived accused of his right to present a defense).

The clear ramification of these cases is that where an accused's constitutional rights are implicated, there must be a compelling government interest to overcome the accused's rights[7]. It is obvious, however, based on the Court of Appeals' opinion in *Gipson*, this Court's opinion in *Daubert*, their progeny, and the polygraph cases from the Circuits, that there is no compelling government interest in declaring polygraph evidence *per se* inadmissible. *See United States v. Posado*, 57 F.3d 328, 433 (5th Cir. 1995) (After *Daubert*, a *per se* rule is not viable.) Thus, Specialist Williams must be given the opportunity to establish admissibility of his polygraph evidence. Denial of this opportunity results in an unwarranted abrogation of his constitutional rights.

The evidentiary hearing ordered by the Army court is clearly needed in order to review the merits of this case. Indeed, the only "evidence" pertaining to the polygraph

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[7]No compelling government interest undergirds Mil. R. Evid. 707. The non-binding Drafter's Analysis of Mil. R. Evid. 707 sets forth the purported reasons for the *per se* exclusion of polygraph evidence, including:

> (1) fear that court members would be misled, (2) concern that a confusion of issues would arise, (3) the possibility that the trial would incur a substantial waste of time, and (4) that the polygraph is inherently unreliable.

Williams, 39 M.J. at 558. The Army court, however, correctly disposed of these reasons by noting that the first three concerns are routinely resolved by trial judges under Mil. R. Evid. 403. Moreover, the Army court declared that the "fourth reason is, in its worst light, disingenuous, and at best incongruous with the substantial investment the Department of Defense has made, and continues to make, in polygraph examinations...." *Williams*, 39 M.J. at 558.

examinations and their results is contained in trial defense counsel's motions and in-court statements because the military judge did not allow any other evidence. The reports of the polygraph examinations are not even included in the record of trial. Thus, this Court should set aside the decision of the Court of Appeals and reinstate the Army court's order to the trial court to hold an evidentiary hearing.

CONCLUSION

This is the first case affirmed by the military courts to come before this Court since Military Rule of Evidence 707's *per se* ban on the admissibility of polygraph evidence. The Court of Appeals, in establishing a rule that the "accused had no right to introduce the polygraph evidence without taking the stand and testifying", failed to give full acknowledgement to the breadth of petitioner's right to present a defense. In fact, the circumstances of this case make clear the need for case-by-case analysis when an accused asserts the constitutional right to present evidence notwithstanding a rule of prohibition. Petitioner's is not a case of either bolstering his trial testimony or presenting "super-enriched hearsay[8]." Instead, this case squarely deals with *defending against the government's evidence*, perhaps the most basic of an accused's trial options.

As revealed in the government's opening statement, petitioner's pretrial statements to criminal investigators constituted a critical component of the government's case. (R. at 141, 152.) It was in large part from this confession that trial counsel urged the accused's culpability for all charged offenses. (R. at 314, 322, 336.) Yet this was not a complete confession to all charged offenses. And it was

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[8] *Williams*, ___ M.J. ___ (1995), slip op. at 11 (Appendix A).

this very point which was at the heart of the defense herein: the confessions, proffered as evidence by the government, demonstrate only limited misconduct, not the full range of criminality charged. It was a critical component of the defense to show the limitations within the confessions were true and that the pretrial statements did not support broad inferences of criminality.

Thus, the opinion of the polygraph examiner, who could compare the pretrial statement in evidence with the substance and results of the polygraph examination, were critical to the defense. The opinion of the polygraph examiner was obviously relevant without precatory testimony from petitioner. Under such circumstances, it is both unreasonable and unjust that petitioner be required to waive his right to remain silent at trial simply to defend against the very evidence offered against him. Yet this is precisely the requirement imposed by the Court of Appeals—a requirement, petitioner submits, which should be quickly expunged by this Court.

Petitioner had a right to defend against evidence presented by the government. It matters not that the nature of that defense was a demonstration of the credibility and weight of the government's evidence. In the instant case, that the Court of Appeals would require petitioner to waive his trial privilege against self-incrimination as a predicate to the opportunity to defend is the antithesis of a fair and just result.

Because of a split in the Courts of Appeals on the admissibility of polygraph evidence as well as this case's unique resolution by the court below and the prejudice that inured to petitioner thereby, this case raises an important constitutional question regarding the manner in which Military Rule of Evidenc 707 currently operates.

For the foregoing reasons, this Court should grant review of the judgment of the United States Court of Appeals for the Armed Forces.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF MILITARY APPEALS

UNITED STATES, APPELLEE,

v.

JAMES L. WILLIAMS, SPECIALIST
U.S. ARMY, APPELLANT.

No. 94-5006

CMR No. 9202646

United States Court of Appeals for the Armed Forces
Argued March 30, 1995
Decided September 29, 1995

Counsel

For the Accused: *Captain Blair M. Jacobs* (argued); *Colonel Stephen D. Smith, Lieutenant Colonel James H. Weise, Major Fran W. Walterhouse, Captain Teresa L. Norris* (on brief); *Major Kenneth T. Grant, Major Roy H.Hewitt, Captain Walter S. Weedman.*

For the United States: *Captain Anthony P. Nicastro* (argued); *Colonel Dayton M. Cramer, Lieutenant Colonel James L. Pohl, Captain Gregory T. Baldwin* (on brief).

Amicus Curiae on behalf of the Accused:
the Benjamin N. Cardozo School of Law, Yeshiva University: *Frank J. Macchiarola, Esq.* (argued); *George S. Sava* (on brief)—For.

Appellate Government Counsel: *Captain Jane M.E. Peterson* (argued); *Colonel Jeffery T. Infelise, Colonel Thomas E. Schlegal* (on brief)—For.

Military Judge: B.C. Dale, Jr.

Opinion Of The Court

COX, Judge:

1. The certified issue in this case asks whether Mil. R. Evid. 707, Manual for Courts-Martial, United States, 1984, which purports to bar the receipt at courts-martial of polygraph evidence, violates accused's constitutional rights.

2. Mil. R. Evid. 707 provides:

> (a) Notwithstanding any other provision of law, the results of a polygraph examination, the opinion of a polygraph examiner, or any reference to an offer to take, failure to take, or taking of a polygraph examination, shall not be admitted in evidence.
>
> (b) Nothing in this section is intended to exclude from evidence statements made during a polygraph examination which are otherwise admissible.[1]

3. In the instant case accused sought, unsuccessfully, to introduce evidence of an allegedly exculpable polygraph. In the circumstances of this case, we hold that accused's rights were not violated and that the military judge did not err in excluding the evidence.

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[1]The drafters of the rules cite a variety of "policy grounds" for excluding polygraph evidence, including, allegedly: the "danger ... that court members will be misled by polygraph evidence" and the "danger of confusion of the issues"; the "substantial waste of time when the collateral issues regarding the reliability of the particular test and qualifications of the specific polygraph examiner must be litigated in every case"; the "burden on the administration of justice that outweighs the probative value of the evidence"; and that "[t]he reliability of polygraph evidence has not been sufficiently established and its use at trial impinges on the integrity of the judicial system." Drafters' Analysis, Manual for Courts Martial, United States, 1984 at A22-46.

I

4. Accused was charged with 12 specifications of forging checks, between August 1991 and February 1992, in violation of Article 123, Uniform Code of Military Justice, 10 USC § 923, and a single specification of stealing the cumulative value of the negotiated checks—$8,077.89—in violation of Article 121, UCMJ, 10 USC § 921. He pleaded not guilty to all the forgery specifications. He also pleaded not guilty to the larceny specification, but, by exceptions and substitutions, he pleaded guilty to the lesser offense of wrongful appropriation, in the amount of $2,528.00. (R.56)

5. Notwithstanding his pleas,however, a general court-martial composed of officer and enlisted members convicted accused of all charges and specifications, as alleged. He was sentenced to a bad-conduct discharge, confinement for 3 years, total forfeitures, and reduction to E1. The convening authority approved the adjudged sentence.

6. The Court of Military Review[2], however, ordered the record of trial to be remanded for an additional hearing regarding admissibility of certain polygraph evidence. 30 MJ 555, 559 (1994). Thereupon, the Judge Advocate General of the Army certified the issue for this Court's review. 39 MJ 408 (1994).

II

7. The Court of Military Review summarized the facts as follows:

> [Accused) was a Chaplains' Fund Clerk who, along with the Fund Manager, was in charge of collecting and disbursing funds for

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[2]*See* 41 MJ 213 n.* (1994).

the chaplaincy within V Corps. During the period 18 August 1991—18 February 1992, a total of eighteen unauthorized disbursements were made from the fund account. [Accused] admitted to misappropriating three of these unauthorized disbursements in 1992, which he said that he intended to repay. He denied stealing the remainder.

In July 1992, [accused] consented to taking a Criminal Investigation Command (CID) administered polygraph test. The test centered on whether [accused] stole from the chaplains' fund between August and November of 1991. In the polygraph examiner's opinion, there was no deception indicated when [accused] responded "no" to questions pertaining to the tested issue. The charts created by the polygraph instrumentation were then sent to the CID's quality control center in Maryland, which opined that the test results were inconclusive.

In August 1992, upon request by [accused], he was retested by the same CID polygrapher. A more detailed pretest interview was conducted in order to focus [accused] so that he would not be distracted, which could cause the test to be inconclusive. After this test, the examiner again opined that [accused] was indicating no deception when he said that he did not steal money from the chaplains' fund between August and November 1991. Unlike the previous test, the examiner sent these polygraph charts to Heidelberg for review by his immediate supervisor, who was also an experienced CID polygrapher. The supervisor agreed with the findings and forwarded

> the charges to quality control in Maryland. This time, quality control opined that the test indicated no deception, and went on to say that the findings of the two examiners were "strong."
>
> [Accused] filed a motion at his court-martial to be allowed an opportunity to lay a foundation for the admission of the two exculpatory CID polygraph examinations. The military judge denied the motion, finding Mil. R. Evid. 707 to be a proper exercise of executive rule-making authority under Article 36, UCMJ, and violative of neither the Fifth nor Sixth Amendments of the Constitution. This ruling "impacted greatly" on [accused's] decision not to testify.

39 MJ at 556-57.

III

8. The Government's evidence at trial consisted, in part, of accused's sworn, written, signed pretrial statement. According to the statement, the interrogating agent asked, among other things:

> Did you, without proper authority, cash checks on the account of the chaplains [sic] Fund, V Corps, with the intent of keeping the funds for yourself?

Accused responded: "Yes."

9. Accused also conceded therein that he fraudulently made and uttered three of the checks in issue, and he identified the uses to which he put the proceeds. The

balance of the admission describes in some detail the mechanics of accused's crimes, and an acknowledgement that, on March 27, 1992, he deposited $900 into the Fund. (Accused explained that he "sent for the money from a relative, to deposit the money into the Chaplains' Fund account.")[3] (P.E. 1) The admission contains no recitation suggesting that, at the time he uttered the checks, accused only intended temporarily to deprive the rightful owner of the proceeds.

10. Additional prosecution evidence, in the form of numerous records and documents and the testimony of various investigative, banking, and Chaplains' Fund officials, showed in detail how accused manipulated the established procedures to both perpetrate his thefts and to mask their discovery. Still further evidence documented the flowage of the proceeds of the forged checks into accused's personal bank account.

11. The defense case consisted, in part, of the testimony of accused's wife, wherein she attempted to explain several of the anomalous credits to their bank account. The balance of the defense case on the merits consisted of a series of character witnesses.[4] Notably, accused did not testify on the merits.

[3]Presumably, accused's argument that this deposit contradicted an intent permanently to deprive was undercut by evidence that he had previously been tipped off that his crimes had been detected. About a month before accused's deposit, his supervisor "became suspect that there was some type of—something just wasn't right with the fund." The supervisor promptly notified higher authorities and, shortly thereafter, mentioned it to accused.

[4]Ironically, some of these character witnesses may have proven counterproductive for the defense. Accused's company commander, for example, extolled accused for his administrative and organizational abilities, his initiative, his "computer literacy," and his "unique ability to package things." According to the commander, "I give him a product to do, he just works magic." Considering the Government evidence that accused was able to perpetrate his offenses and avoid detection as long as he did due to a series of missing computer backup disks, missing and falsified documents,computers that had been "tampered with," and a rash of mysterious viruses causing the office computers to crash, the evidence of accused's extraordinary intelligence

IV

12. *United States v. Gipson,* 24 MJ 246 (CMA 1987), was a case in which we considered the admissibility of polygraph evidence. Gipson proffered that he had secured, at his own expense, a polygraph examiner who had tested Gipson and, as a result, was of the opinion that Gipson was telling the truth when he denied committing various charged drug offenses. The prosecution countered that it, too, had a witness—a Government polygrapher—who had tested Gipson and had reached the opposite conclusion. The military judge declined to permit either party to introduce polygraph evidence or even to attempt to lay a foundation for its admission. The judge concluded, *inter alia,* that such evidence had not met the requisite level of acceptance in the scientific community. 24 MJ at 247.

13. The issue squarely before us was whether the judge erred in applying the "general acceptance" test of *Frye v. United States,* 293 F. 1013 (D.C. Cir. 1923), or whether the relevance-helpfulness rules of Military Rules of Evidence 401-03 and 702 governed. As had several Federal Courts of Appeals before us (applying the corresponding Federal Rules of Evidence), we concluded that *Frye* was no longer the test to be applied to expert testimony. 24 MJ at 250-51. Passing no judgment on the ultimate admissibility of polygraph evidence in general or on that polygraph evidence in particular, we concluded merely that the military judge applied the wrong test and that he erred in denying Gipson the opportunity to attempt to lay a foundation for the admission of his polygraph evidence.

14. Later, in *Daubert v. Merrell Dow Pharmaceutical, Inc.,* ___ U.S. ___, 113 S.Ct. 2786 (1993), the Supreme Court laid the *Frye* test to rest—in favor of the Rules of Evidence test—as the general test for the receipt of expert testimony. *See also United States v. Nimmer,* ___ MJ ___ (1995); *United States v. Youngberg,* ___ *MJ* ___ *(1995).*

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and skills may have merely complimented the Government's evidence.

15. However, the holdings of Gipson, Daubert, et al., do not, in this respect, govern the instant case. The *Daubert* opinion commenced with an analysis of Fed. R. Evid. 402, which provides:

> All relevant evidence is admissible, *except as otherwise provided* by the Constitution of the United States, by Act of Congress, *by these rules,* or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible.

(Emphasis added.)

16. There being no other Federal rules which precluded the particular type of evidence (epidemiological) offered in *Daubert,* the opinion proceeded to an analysis of Fed. R. Evid. 702, which provides:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

For the *Daubert* Court, then, resolution turned on the questions of relevance and helpfulness, with the focus being on the means by which the trial judge was to determine these factors. 113S.Ct. at 2796-98.

17. The *Gipson* opinion was decided in a similar environment, as Mil. R. Evid. 707 was not yet in effect. Thus, in construing Mil. R. Evid. 402, which provides:

> All relevant evidence is admissible, *except as otherwise provided by* the Constitution of

> the United States as applied to members of the armed forces, the code, *these rules, this Manual,* or any Act of Congress applicable to members of the armed forces. Evidence which is not relevant is not admissible.

We also had merely to consider the general rules respecting relevance and the helpfulness of expert testimony. (Emphasis added.)

18. The advent of Mil. R. Evid. 707, however, changed things for the military. Now, rather than the Military Rules of Evidence providing a framework for the analysis of relevance and helpfulness, ''these rules'' expressly forbid the receipt of the type of evidence here in issue. Thus *Daubert* and *Gipson,* being interpretations of very different rules, no longer control the analysis of the admissibility of polygraph evidence in courts-martial.

19. So also, the recent spate of Federal cases applying *Daubert* to polygraph evidence are not germane to our inquiry. *See United States v. Posado,* 57F.3d 428 (5th Cir. 1995)(''the rationale underlying this circuit's per se rule against admitting polygraph evidence did not survive. *Daubert v. Merrell Dow Pharmaceuticals, Inc....* Therefore, it will be necessary to reverse and remand to the district court for determination of the admissibility of the proffered evidence in light of the principles embodied in the Federal Rules of Evidence and the Supreme Court's decision in *Daubert*''); *United States v. Crumby,* 1955 WL 461929 (D Ariz. July 7, 1995) (improvements in accuracy of polygraph and *Daubert* permit defendant to introduce evidence that he passed polygraph to counter attacks on his credibility); *but cf. United States v. Lech,* 1955 WL 461584 (DC SNY July 26, 1995) (even assuming polygraph results are admissible under Fed. R. Evid. 702, questions calling for legal conclusions, but not underlying facts, would not assist factfinder).

V

20. Instead, the focus becomes whether, and under what circumstances, the *per se* prohibition of polygraph evidence in courts-martial might violate servicemembers' constitutional rights. The Supreme Court has, from time to time, encountered situations in which bars to the receipt of evidence have been imposed upon the criminally accused. In *Washington v. Texas,* 338 U.S. 14 (1967), for example, Washington sought, unsuccessfully, to call a coparticipant, Fuller, as a witness. Fuller allegedly would have testified that he, not Washington, was the triggerman in the murder. Texas statutes at the time of trial precluded coparticipants from testifying for one another, but not from testifying for the State. 338 U.S. at 16-17.

21. The Court concluded:

> the petitioner in this case was denied his right to have compulsory process for obtaining witnesses in his favor because the State arbitrarily denied him the right to put on the stand a witness who was physically and mentally capable of testifying to events that he had personally observed, and whose testimony would have been relevant and material to the defense.

388 U.S. at 23 (footnote omitted).

22. In *Chambers v. Mississippi,* 410 U.S. 284 (1973), a State "party witness" or "voucher" rule prevented Chambers from examining, as an adverse witness, a person (McDonald) who had previously confessed to committing the crime of which Chambers stood accused. Because the State had declined to call the McDonald, Chambers was forced to make him his own witness. While the State, on cross-examination, was permitted to elicit the McDonald's

recantation of the confession, Chambers was barred from cross-examining. In addition, State hearsay rules precluded Chambers from introducing the testimony of three other persons to whom McDonald had allegedly confessed.

23. Regarding the "voucher" rule, the Court observed:

> The argument that McDonald's testimony was not "adverse" to, or "against," Chambers is not convincing. The State's proof at trial excluded the theory that more than one person participated in the shooting of Liberty [the deceased police officer]. To the extent that McDonald's sworn confession tended to incriminate him, it tended also to exculpate Chambers. And, in the circumstances of this case, McDonald's retraction inculpated Chambers to the same extent that it exculpated McDonald. It can hardly be disputed that McDonald's testimony was in fact seriously adverse to Chambers. The availability of the right to confront and to cross-examine those who give damaging testimony against the accused has never been held to depend on whether the witness was initially put on the stand by the accused or by the State. We reject the notion that a right of such substance in the criminal process may be governed by that technicality or by any narrow and unrealistic definition of the word "against." The "voucher" rule, as applied in this case, plainly interfered with Chambers' right to defend against the State's charges.

410 U.S. at 297-98.

24. Regarding the hearsay evidence, the State declaration-against-interest exception to the rule against

hearsay included declarations against pecuniary interest, but it did not include declarations against penal interest. The Court noted that the statements in question "were originally made ... under circumstances that provided considerable assurance of their reliability." 410 U.S. at 300. In addition, "McDonald was present in the courtroom and was under oath. He could have been cross-examined by the State, and his demeanor and responses weighed by the jury." 410 U.S. at 301.

25. Concluding that Chambers' due process rights were violated, the Court commented:

> Few rights are more fundamental than that of an accused to present witnesses in his own defense.... In the exercise of this right, the accused, as is required of the State, must comply with established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence. Although perhaps no rule of evidence has been more respected or more frequently applied in jury trials than that applicable to the exclusion of hearsay, exceptions tailored to allow the introduction of evidence which in fact is likely to be trustworthy have long existed. The testimony rejected by the trial court here bore persuasive assurances of trustworthiness and this was well within the basic rationale of the exception for declarations against interest. That testimony also was critical to Chambers' defense. In these circumstances, where constitutional rights directly affecting the ascertainment of guilt are implicated, the hearsay rule may not be applied mechanistically to defeat the ends of justice.

410 U.S. at 302 (citations omitted). 26. *See also Davis v. Alaska,* 415 U.S. 308 (1974) (State law barring the receipt in evidence of juvenile records and probation status of key prosecution witness violated petitioner's right of confrontation, by depriving petitioner of opportunity to show witness had motive falsely to implicate petitioner), *Crane v. Kentucky,* 475 U.S. 683 (1986) (established State rule that trial court's determination regarding voluntariness of pretrial confessions is conclusive and may not be relitigated at trial denied petitioner opportunity to attack accuracy of his purported confession and deprived him of his fundamental constitutional right to a fair opportunity to present a defense); *Rock v. Arkansas,* 483 U.S. 44 (1987) (State's *per se* rule excluding all hypnotically refreshed testimony prevented petitioner from showing that her memories might be reliable and potentially deprived her of her Fifth and Sixth Amendment right to be heard in her own defense).

VI

27. Thus, in the appropriate case, the question will be whether the proffered polygraph evidence is sufficiently reliable and necessary that its automatic exclusion violates the accused's constitutional trial rights. We conclude, however, that this is not such an appropriate case, for reasons we now address.

28. The issue of admissibility of the instant polygraph evidence was resolved at trial on the basis of proffers by the parties. The polygrapher did not testify, and no documentation of the test questions or results was presented. Nevertheless, both parties agreed that the critical "relevant" questions at the polygraph examination focused on whether accused stole money from the chaplains' fund. Accused responded, "No," to such questions. (R.24; A.E. III, p.1; A.E. VI, p.1) Thus it was accused's denial of

criminality that the polygrapher was prepared to opine was true (*i.e.*, that "no deception was indicated").[5]

29. Having failed to take the stand and submit himself to the crucible of cross-examination, accused argues that he should have been permitted nevertheless to introduce this out-of-court assertion, bolstered as it was with the expert's opinion that it was truthful.[6] Of course this statement was made expressly with a view toward trial, after the alleged commission of the offenses, and, in light of the polygraphic support, it was unabashedly offered to prove the truth of the matter asserted. In other words, the proffered evidence was not just hearsay, but super-enriched hearsay.

30. Allowing a party, in effect, to testify by proxy—without at the same time affording the opposition an opportunity to cross-examine or the factfinder an opportunity to observe and make its own evaluation of the party's credibility—would amount to a nullification of the adversary system and a throwback to a bygone and little-missed era. *See* 2 McCormick on Evidence §§ 244-46 at 90-99 (J. Strong 4th ed. 1992). The constitutional rights of an accused are designed to assure a fair trial, not to subvert the adversary process.

31. That the expert's opinion cannot be separated from the underlying out-of-court declaration is self-evident, as

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[5]Of course a polygrapher's opinion cannot possibly gauge the objective truth of any statement. At best they can opine that the subject *believed* the statement to be true. Thus, just as multiple witnesses to an event may take away different memories and interpretations of the same physical manifestation, in theory they could each pass a polygraph examination asserting their differing interpretations.

[6]Accused cannot capitalize on the vacuum arising from the fact that he obtained the unfavorable ruling *in limine* and then elected not to take the stand. In order to perfect his claim of right on appeal, it would have been necessary for him to testify or to establish some other valid evidentiary basis for admission of the hearsay evidence. *United States v. Gee*, 39 MJ 311 (1994); *see Luce v. United States*, 469 U.S. 38 (1984). At trial, accused offered no hearsay exception justifying receipt of the evidence.

the expert testimony clearly could not be offered simply to show that appellant made *some* truthful statement. Only when the opinion is connected with the underlying statement, explicitly or implicitly, can it have any arguable relevance to the case. We take it as obvious that when a party offers a polygrapher's opinion that a certain assertion did not indicate deception, the party is offering the evidence to prove that the assertion was true. A rose by any other name would smell as sweet.

32. The mere fact that the evidence was hearsay does not, alone, condemn it. However, unlike *Chambers v. Mississippi, supra* (involving the accused fundamental right to confront an adverse witness), this evidence was not presumptively reliable or closely akin to a recognized hearsay exception. Indeed, none of the cases in which the Supreme Court found evidentiary prohibitions objectionable involved efforts by an accused to circumvent the adversary process by "smuggling" in his assertions, *in lieu* of testifying.[7] Had accused testified, he might at least have argued that the truthfulness of his out-of-court statement was not offered to prove the truth of the matter asserted, but for the inference that his consistent *trial* testimony was true.

33. In *United States v. Gipson, supra,* we addressed a similar concern. As we stated it then:

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[7]We recognize that, in some circumstances, it is possible under Fed. R. Evid. 703 and Mil. R. Evid. 703 for a certain amount of hearsay evidence to be "smuggled" in as basis for an expert's opinion. *See* S. Saltzburg, M. Martin, D. Capra, 2 Federal Rules of Evidence Manual 1134 (6th ed. 1994); S. Saltzburg, L. Schinasi, D. Schlueter, Military Rules of Evidence Manual 596 (2d ed. 1986). However, it is clear from the rule drafters' notes and the recorded decisions that such hearsay basis is permitted because it leads to some diagnosis or opinion other than that the hearsay itself was true. For example, a doctor might rely on a range of medical tests and reports, as well as statements of the victim or witnesses—not to show that the statements were true—but in order to reach a medical diagnosis. Rule 703 was never intended to become the electronic oath helpers' exception to the rule against hearsay. *Cf.* 2 McCormick on Evidence §§ 244-46 at 90-99 (J. Strong 4th ed. 1992).

> Assuming a judge decides to admit the results of a given polygraph, how can they be used at trial? First and foremost, while polygraph evidence relates to the credibility of a certain statement, it does not relate to the declarant's character. At best, the expert can opine whether the examinee was being truthful deceptive in making a particular assertion *at the time of the polygraph exam.* It is then for the factfinder to decide whether to draw an inference regarding the truthfulness of the examinee's *trial* testimony. *Cf. Commonwealth v. Vitello,* 376 Mass. 426, 381 N.E.2d 582, 597-98 (1978). Theoretically, it is conceivable that an expert's opinion about the truthfulness of a statement made during a polygraph exam could even support a direct inference as to guilt or innocence. However, we would not condone such opinion testimony absent the examinee's consistent testimony. If it were otherwise, the conclusions of the expert concerning the credibility of the declarant would be the only evidence presented to the factfinder. In this circumstance, we really would be concerned about usurpation of the factfinder's role.

24 MJ at 252-53 (footnotes omitted).

34. In concluding that accused had no right to introduce the polygraph evidence without taking the stand and testifying consistently, or without offering some other plausible evidentiary basis, we recognize that we resolve little of the underlying question of the constitutionality of Mil.R.Evid. 707. Indeed, we do not even resolve whether the *per se* exclusion of this genre of evidence can be

sufficient to implicate a constitutional right of an accused. That is to say, is this collateral-type evidence (an out-of-court, post-offense assertion of innocence by an accused, offered by the accused) of the same constitutional magnitude as those types of evidence that the Supreme Court has ruled constitutionally required? There are simply so many variables in the circumstances of individual cases, that we deem it fruitless at this point to speculate generally in the absence of specific facts.

The decision of the United States Army Court of Military Review is set aside. The record of trial is returned to the Judge Advocate General of the Army for remand to the Court of Criminal Appeals for further review.

Judge GIERKE concurs.

WISS, Judge (concurring):

I concur in the majority opinion except that, as to footnote 6, I expressly keep open for myself the question whether a non-testifying accused may preserve this issue for appellate review if he makes and loses a motion *in limine* to admit expert testimony concerning polygraphic evidence and then, through counsel—an officer of the court—forthrightly asserts that he would have testified had his motion been granted. *See United States v. Sutton*, 31 MJ 11 (CMA 1990).

CRAWFORD, Judge (concurring in part and in the result):

I agree with the majority's excellent discussion as to whether there is a constitutional right to introduce exculpatory polygraph evidence that would be paramount to any Military Rule of Evidence. However, since neither the Constitution nor the Code compel the admission of exculpatory polygraph evidence, the majority could have stopped at that point. *United States v. Rodriguez*, 37 MJ 448, 453 (CMA 1993) (Crawford, J., concurring in the result).

In any event, since the defendant did not take the witness stand, he did not preserve the granted issue for appeal. *United States v. Gee,* 39 MJ 311 (1994); *see also Luce v. United States,* 469 U.S. 38 (1984).

However, I find curious that portion of the opinion that says "the proffered evidence was not just hearsay, but super-enriched hearsay." ___ MJ (11). The majority goes on to say, "[T]he expert's opinion cannot be separated from the underlying out-of-court declaration," (*id.*) thus implying that there would be a hearsay objection to the expert's opinion. But as this Court stated in *United States v. Houser,* 36 MJ 392, 399 (CMA 1993):

> Under Mil. R. Evid. 703, like Fed. R. Evid. 703, an expert's opinion may be based upon personal knowledge, assumed facts, documents supplied by other experts, or even listening to the testimony at trial.

Fed. R. Evid. 703 was enacted to allow the expert to rely upon hearsay evidence, that is, evidence that would be relied upon to form an opinion, such as statements from other doctors, x-rays, business reports, and so forth. S. Saltzburg & M. Martin, *Federal Rules of Evidence Manual* 73 (5th ed. 1990). *See also* J. Kaplan, J. Waltz & R. Park, *Cases and Materials on Evidence* 764, 806 (7th ed. 1992).

Therefore, it would seem to me that the defendant's statements to a polygrapher are a valid basis for an otherwise relevant opinion. *See Barefoot v. Estelle,* 463 U.S. 880, 896-903 (1983); *United States v. Prevatte,* 40 MJ 396, 397 (CMA 1994); *United States v. Johnson,* 38 MJ 17 (CMA 1993); *State v. Daniels,* 446 S.E.2d 298 (N.C. 1994). However, since I believe this case can be decided on other grounds, the question of whether the majority's view on hearsay is correct can wait for another day.

SULLIVAN, Chief Judge (concurring in the result):

I agree with much of the majority opinion but conclude it does not go far enough to directly answer the certified issue. It asks:

> WHETHER MILITARY RULE OF EVIDENCE 707 VIOLATES THE ACCUSED'S FIFTH AMENDMENT RIGHT TO A FAIR TRIAL OR HIS SIXTH AMENDMENT RIGHT TO PRODUCE FAVORABLE WITNESSES?

Initially, I would hold that the Fifth and Sixth Amendments of our Constitution do apply to the military. As the venerable Blackstone intimated long ago, I believe that a soldier who serves his country does not forgo his rights as a citizen. Blackstone, *Commentaries on the Laws of England* Bookfirst, Chapter 13 at 395 (1765). Furthermore, I would hold that due process and the right to a fair trial require the admission of relevant and reliable evidence as long as it applies to the crime, the witnesses, and the legal defenses to the crime. The Constitution, however, does not require admission of machine generated evidence which shows whether the defendant believes his claim of innocence is truthful. Modern courts have consistently prevented the admission of evidence of truth telling and I would do so in this case.

In this case, the polygraph evidence sought to be introduced at trial was the polygraph result of "no deception" when appellant was asked whether he "stole from the Chaplain's fund between August and November of 1991." *United States v. Williams*, ___ MJ ___ (slip opinion at 2) (USACCA). In my view, the trial judge properly ruled this evidence inadmissible.

First, when evidence of the polygraph tests results are offered at trial to support the credibility of an accused's pretrial statement denying an offense, its admission also

raises serious questions under Mil. R. Evid. 608. *See generally United States v. Azure,* 801 F.2d 336, 340-41 (8th Cir. 1986). That rule states:

> Rule 608. Evidence of Character, conduct, and bias of witness
>
> (a) Opinion and reputation evidence of character. The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.

Applying this rule, we have barred testimony from psychiatric and psychological experts that child abuse victims are telling the truth in their pretrial complaints. *United States v. Marrie,* 94-5007, ___ (___); *United States v. Suarez,* 35 MJ 374, 376 (CMA 1992); *United States v. Arruza,* 26 MJ 234, 236-37 (CMA 1988). The same logic should be extended to a mechanical oath swearer or compurgator.

I would also note that the admissibility of such evidence for this purpose infringes on the jury's role in determining credibility. *See United States v. Alexander,* 526 A.2d 161, 168-169 (8th Cir. 1975). The Sixth Circuit commented on this problem in *Brown v. Darcy,* 783 F.2d 1389, 1396-97 (9th Cir. 1986).

> The introduction of polygraph evidence also infringes on the jury's role in determining credibility. Our adversary system is built

on the premise that the jury reviews the testimony and determines which version of events it believes. Allowing a polygraph expert to analyze responses to a series of questions and then testify that one side is telling the truth interferes with this function. *See Alexander* 526 F.2d at 168; *see also Dowd,* 585 F.Supp. at 434. Polygraph evidence is different from other scientific evidence such as ballistics, fingerprints, or voice analysis, because it is an opinion regarding the ultimate issue before the jury, not just one issue in dispute. *Alexander,* 526 F.2d at 169. Providing the jury with an all or nothing evaluation of credibility and then telling the jury that this evaluation has an eighty percent to ninety percent chance of being accurate if the polygraph was properly administered interferes with, rather than enhances, the deliberative process.

APPENDIX B

UNITED STATES COURT OF MILITARY APPEALS

UNITED STATES, APPELLEE,

v.

SPECIALIST JAMES L. WILLIAMS, 255-27-5907,
UNITED STATES ARMY, APPELLANT.

ACMR 9202646.

U.S. Army Court of Military Review.

28 Jan. 1994.

Accused was convicted by general court-martial composed of officer and enlisted members, V Corps, B.C. Dale, Jr., J., on one specification of larceny and 12 specifications of forgery. The United States Army Court of Military Review, Morgan, J., held that military rule of evidence which foreclosed discretion and compelled exclusion of polygraph evidence was unconstitutional as applied to facts of the case.

Returned for remand.

For Appellant: Major Fran W. Walterhouse, JAGC, Captain David L. Thomas, JAGC (on brief).

For Appellee: Colonel Dayton M. Cramer, JAGC, Major Joseph C. Swetnam, JAGC, Captain Gregory T. Baldwin, JAGC (on brief).

Before CREAN, MORGAN, and GONZALES, Appellate Military Judges.

OPINION OF THE COURT

MORGAN, Judge:

The appellant was tried by a general court-martial composed of officer and enlisted members. Contrary to his pleas, he was convicted of one specification of larceny and twelve specifications of forgery, in violation of Articles 121 and 123, Uniform Code of Military Justice, 10 U.S.C. §§ 921 and 923 (1988) [hereinafter UCMJ].[1] The convening authority approved the adjudged sentence, which included a bad-conduct discharge, confinement for three years, total forfeitures, and reduction to Private E1.

Before this court the appellant contends, inter alia, that the military judge improperly denied a motion to admit favorable polygraph evidence.[2] This issue we must decide is whether Military rule of Evidence 707 [hereinafter Mil.R.Evid.] is a constitutionally permissible restriction on a soldier's ability to present evidence on his behalf. We hold, as applied to the facts of this case, that it is not.

I.

The appellant was a Chaplain's Fund clerk who, along with the Fund manager, was in charge of collecting and disbursing funds for the chaplaincy with V Corps. During the period 18 August 1991—18 February 1992, a total of eighteen unauthorized disbursements were made from the fund account. The appellant admitted to misappropriating

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[1]The appellant pleaded guilty by exceptions and substitutions to wrongful appropriation, the lesser-included offense of the larceny specification, but was convicted of the greater offense.

[2]This issue was previously the subject of a Petition for Extraordinary Relief in the Nature of a Writ of Mandamus and a Motion for Stay of Proceedings Pendente Lite filed with this court, and a Writ Appeal Petition filed with the U.S. Court of Military Appeals, all of which were denied without prejudice to appellant's right to assert the same claims of error during the course of regular appellate review.

three of these unauthorized disbursements in 1992, which he said that he intended to repay. He denied stealing the remainder.

In July 1992, the appellant consented to taking a Criminal Investigation Command (CID) administered polygraph test. The test centered on whether the appellant stole from the chaplains' fund between August and November of 1991. In the polygraph examiner's opinion, there was no deception indicated when the appellant responded "no" to questions pertaining to the tested issue. The charts created by the polygraph instrumentation were then sent to the CID's quality control center in Maryland, which opined that the test results were inconclusive.

In August 1992, upon request by the appellant, he was retested by the same CID polygrapher. A more detailed pretest interview was conducted in order to focus the appellant so that he would not be distracted, which could cause the test to be inconclusive. After this test, the examiner again opined that the appellant was indicating no deception when he said that he did not steal money from the chaplains' fund between August and November 1991. Unlike the previous test, the examiner sent these polygraph charts to Heidelberg for review by his immediate supervisor, who was also an experienced CID polygrapher. The supervisor agreed with the findings and forwarded the charts to quality control in Maryland. This time, quality control opined that the test indicated no deception, and went on to say that the findings of the two examiners were "strong."

The appellant filed a motion at his court-martial to be allowed an opportunity to lay a foundation for the admission of the two exculpatory CID polygraph examinations. The military judge denied the motion, finding Mil. R.Evid. 707 to be a proper exercise of executive rule-making authority under Article 36, UCMJ, and violative of

neither the Fifth nor Sixth Amendments of the Constitution. This ruling "impacted greatly" on the appellant's decision not to testify.

II.

Military Rule of Evidence 707(a) established a categorical rule barring the admissibility of polygraph evidence at trials by courts-martial:

> Notwithstanding any other provision of law, the results of a polygraph examination, the opinion of a poloygraph examiner, or any reference to an offer to take, failure to take, or taking of a poloygraph examination, shall not be admitted into evidence.

This rule effectively removes any discretion from a military judge to weigh the legal and logical relevance of poloygraph evidence.[3] It denied a proponent an opportunity to even attempt to lay a foundation for admitting poloygraph evidence, regardless of whether it is reliable, relevant, helpful, and even if its probative value outweighs any extraneous factors.

The total ban on admissibility of poloygraph evidence under Mil.R.Evid. 707 represents a dramatic shift from prior military precedent. In *United States v. Gipson,* 24 M.J. 246, 253 (C.M.A. 1987), the Court of Military Appeals assessed the state of the polygraph technique in the following language:

> [D]epending on the competence of the examiner, the suitability of the examinee, the nature of the particular testing process

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[3] *See* J. Canham, Jr., *Military Rule of Evidence* 707: *A Bright-Line Rule That Needs To Be Dimmed,* 140 Mil.L.Rev. 65 (Spring 1993).

> employed, and such other factors as may arise, the results of a particular examination may be as good as or better than a good deal of expert and lay evidence that is routinely and uncritically received in criminal trials. Further, it is not clear that such evidence invariably will be so collateral, confusing, time-consuming, prejudicial, etc., as to require exclusion.

The court clearly felt that poloygraph evidence has evolved to the point where it can no longer be "rejected out of hand," and concluded that the admissibility determination could and should be made by the trial judge, with this caveat:

> [W]e do not suggest that all polygraph evidence is admissible or that this particular evidence should have been admitted. Appellant still bears the burden of establishing the foundational predicates outlined above. Our holding here is only that appellant was entitled to attempt to lay that foundation.

Judge Cox, speaking for the court, outlined the comprehensive scheme for processing expert testimony envisioned under Mil.R.Evid. 401, 402, 403, and 702, and observed that "[t]he judge has considerable room to exercise 'judgment.'" This comprehensive scheme closely parallels the analytical approach to scientific evidence outlined by the Supreme Court six years later in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, ___ U.S. ___, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993).

In *United States v. Rodriguez*, 37 M.J. 448 (C.M.A. 1993). Judge Wiss alluded to the dilemma which we now face in this case, notwithstanding the clear mandate of Mil.

R.Evid. 707.[4] Judge Crawford, in a concurring opinion took exception to the suggestion that either the UCMJ or the Constitution compels the admissibility of polygraph evidence, and illustrated how, in the absence of Mil.R.Evid. 707 and applying the rationale of *Daubert,* a military judge could properly exercise discretion to exclude the results of a polygraph examination.

The key issue for us remains, however, whether a rule which forecloses discretion and compels exclusion of polygraph evidence is constitutionally permissible.

III.

The Supreme Court has not been reluctant to strike down evidentiary rules that restrict an accused's ability to present favorable evidence at trial. In *Washington v. Texas,* 388 U.S. 14, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967), the court held that the Compulsory Process Clause of the Sixth Amendment provides an accused the right to obtain witnesses in his or her favor and have them testify, notwithstanding the effect of state statutes regarding competence of codefendants to the contrary. In *Chambers v. Mississippi,* 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973), the court recognized that the right to call witnesses in one's own behalf is also an essential component of constitutional due process, and held that a state hearsay rule which compromised this right must yield. And in *Rock v. Arkansas,* 483 U.S. 44 at 61, 107 S.Ct. 2704 at 2714, 97 L.Ed.2d 37 (1987), the court explained that "a state's legitimate interest in barring unreliable evidence [the defendant's hypnotically refreshed testimony] does not extend to per se exclusions that may be reliable in an individual case."

The per se exclusion of polygraph evidence mandated by Mil.R.Evid. 707 is based, according to the drafters'

[4]See footnote 2, 37 M.J. at 451.

analysis, on several policy grounds, including (1) fear that court members would be misled, (2) concern that a confusion of issues would arise, (3) the possibility that the trial would incur a substantial waste of time, and (4) that the polygraph is inherently unreliable. The first three of these reasons are in the nature of matters that are routinely resolved by trial judges under Mil.R.Evid. 403. The fourth reason is, in its worst light, disingenuous, and at best incongruous with the substantial investment the Department of Defense has made, and continues to make, in polygraph examinations—not to mention the observation in *Gipson* that "[t]he greater weight of authority indicates that it can be a helpful scientific tool."

[1] In this case the appellant twice submitted to government administered polygraph examinations, both of which resulted in arguably exculpatory results. As the *Gipson* court noted, however, there is no right to present evidence—however much it purports to exonerate an accused—unless it is shown to be relevant and helpful. But the question of whether these findings were reliable, relevant, or helpful was, by virtue of Mil.R.Evid. 707, never addressed. The rule simply removes judicial discretion from this critical step in the evidentiary process. We hold under the facts of this case that appellant's Fifth Amendment right to a fair trial by court-martial, combined with his Sixth Amendment right to produce favorable witnesses on his behalf, affords him the opportunity to be heard on these foundational matters, and allows for the possibility of admitting polygraph evidence, notwithstanding the explicit prohibition of Mil.R.Evid. 707.

IV.

A footnote in the *Rodriguez* majority opinion suggested that Mil.R. Evid. 707 may ironically survive constitutional scrutiny only to the extent that it excludes polygraph

evidence offered by the prosecution, but not the defense. If this is the result, so be it. Our military justice system is replete with examples of safeguards for the rights of military accused which are not available tot heir civilian counterparts. Recognizing yet another of these advantages not only enhances the perception of fairness that is so vital to the integrity of our system, it also reinforces the basic tent of Anglo-American jurisprudence that we are better served by protecting the innocent than by convicting the guilty.[5] In his defense of British soldiers accused of perpetrating the Boston masacre, John Adams stated the proposition thusly:

> [I]t may be proper to recollect with what temper the law requires we should proceed ... we find it laid down by the greatest English judges ... we are to look upon it as *more beneficial* that many guilty persons should escape unpunished than one innocent person should suffer. The reason is because it is of more importance *to the community* that innocence be protected than it is that guilt should be punished.[6] (Emphasis added)

In no community is this reason more compelling than in a military community, where fairness in discipline is so critical to its purpose.

V.

The record of trial is returned to The Judge Advocate General for remand to the same or a different convening authority for a hearing on the admissibility of the proffered

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[5] *See* Note, *Admission of Polygraph Results: A Due Process Perspective*, 55 Indiana Law Journal 157 at 189 (1979).

[6] P. Smith, *John Adams* 124 (1962).

polygraph evidence consistent with this opinion. The convening authority will refer the record to a general court-martial for a limited hearing. The military judge of the court-martial will, under the provisions of Article 39(a), Uniform Code of Military Justice, take evidence and rule on the defense motion. If the judge rules in favor of admission of the evidence, he will set aside the contested findings of guilty and the sentence. He will then refer the matter to the convening authority, who may order a rehearing on the contested charges or, if he deems such a rehearing impractical, may dismiss the contested charges and order a rehearing on the sentence only. If that too is deemed impractical, he may reassess the sentence. If the judge rules against admission of the evidence, then an authenticated, verbatim record of the limited rehearing will be transmitted directly to this court.

Senior Judge CREAN and Judge GONZALES concur.